Factual Accuracy Challenges to Inspection Reports

Key Principles

This Key Principles document has been developed with the legal input and support of Bevan Brittan LLP

November 2017
Objective

CQC inspection reports provide important independent scrutiny of all health and social care services in England. In addition, with the introduction of Quality Ratings for the vast majority of services, and the requirement on providers to publish their ratings, the findings in inspection reports are increasingly significant in terms of their impact upon reputation, patient choice, and staff morale. Negative inspection outcomes can have serious consequences for services in terms of their relationships with PMI insurers and NHS commissioners.

It is essential, therefore, that inspection reports provide a fair, accurate and balanced picture of the services inspected. Errors in reports may not only result in the factual findings being inaccurate, but may (depending on the issue) have a consequential impact in terms of the regulator’s judgements regarding compliance with the Regulations and in terms of the Quality Ratings awarded. It is important, therefore, that providers engage fully with the Factual Accuracy process to work with the regulator to ensure that inspection reports are accurate (based on the position at the time of the inspection) and proportionate in the judgements set out. The aim of this Key Principles document is to provide some guidance to providers regarding the Factual Accuracy process and how best to approach it.

This Key Principles document focuses on the specific process for challenging CQC inspection reports in England. However, many of the underlying principles will also be relevant for providers to consider when bringing any challenge to the contents of draft inspection reports issued by the regulators in Wales and Scotland.

Context and Process

Following any inspection, CQC has a duty (under section 61 of the Health and Social Care Act 2008) to prepare and publish a report of its inspection findings.

It is CQC’s practice to send the inspection report, in draft, to the provider, along with a Factual Accuracy Comments Form.

CQC’s standard process is that providers have 10 working days, from receipt of the draft report, to submit comments as part of the Factual Accuracy process. Although not an absolute requirement, it is strongly recommended that providers submit any comments they wish to make on the Factual Accuracy Comments Form as this aids the structuring of the challenges. The form also has a space for CQC to set out, in relation to each point raised, whether it accepts or rejects the challenge, along with its reasons.

Once the comments have been submitted, CQC will consider the comments and whether, in the light of these, it intends to make any changes to the factual findings, judgements, and / or ratings in the draft report before it is finalised and published.

What is the legal position?

As mentioned, CQC has a statutory duty to publish inspection reports. The content of the report, in terms of the factual findings and judgements set out, is, ultimately, a matter for CQC to decide. However, like all public bodies, CQC must act reasonably in determining the contents of inspection reports, and the Factual Accuracy process is a fundamental ‘check and balance’ to support this aim.
Ultimately, if, following the Factual Accuracy process, a provider remains dissatisfied with the contents of the report, the only route of legal challenge is to make an application to the courts for judicial review. In very broad terms, in order to succeed in an application for judicial review, the provider would need to show that, in the production of the report, CQC had acted in a way which was:

- **Unlawful**
- **Irrational** (in a sense that it has made a decision, with regard to the facts or judgements set out in the report, that no reasonable registration authority would make in those circumstances); or
- **Procedurally Flawed** or contrary to some Legitimate Expectation of the provider.

However, there has been some development of the law in this area. In the case of R (ex parte SSP Health) -v- CQC, the Court held that, in some circumstances, the requirement to bring an application for judicial review, in order to challenge CQC’s decisions during a Factual Accuracy process, imposed a disproportionate burden on providers. The Court declared that “there is an obligation on the CQC to carry out an independent review of a decision made in response to comments in the Factual Accuracy Comments Log, on a request to do so by the inspected entity, if the ground of complaint is that a fact-finding maintained in the draft report is demonstrably wrong or misleading”.

It is worth stressing that this does not apply to all disagreements between the provider and CQC as to the contents of the inspection report, but aspects of the report which are “demonstrably wrong or misleading”.

Following this case, CQC has improved the format of the Factual Accuracy Comments Form to assist providers in submitting comments and evidence in response to draft reports with a view to ensuring the final reports are accurate and proportionate. The new form enables providers to set out three types of comments:

- **Section A**: regarding pure typographical or numerical errors in the draft report.
- **Section B**: other challenges to the accuracy of the evidence in the draft report – providers can make a number of different types of challenges under this section of the form, including:
  - that factual findings set out in the draft report are **inaccurate**
  - that factual findings set out in the draft report, although factually accurate, are **misleading** in some way
  - that CQC has **misinterpreted relevant guidance** (for instance, Health Building Notes) in arriving at its judgements
  - that CQC’s judgement that certain factual findings constitute a breach of the Regulations is **incorrect or disproportionate**.
- **Section C**: additional relevant information (which does not appear in the draft report) which should be taken into account.
What AIHO members must do, practically, to get the most out of the process?

Consider CQC’s feedback

► Consider the (verbal and written) feedback provided at the end of the inspection. If, from this, it appears that some of CQC’s factual findings are incorrect, the provider may wish to begin preparing comments (and supporting evidence) to demonstrate the correct factual position. Ideally, this should be sent to CQC, in order to influence the report, even before the draft report is received. However, if it has not been possible to get these comments to CQC prior to receipt of the draft report, they can be submitted as part of the Factual Accuracy process.

Consider the need for more information from CQC

► Upon receipt of the draft report, consider whether any challenge you wish to make would be assisted / supported by information which you believe may be within the inspectors’ inspection notes. This may include:

► if you believe that the inspector’s actual inspection findings in relation to a particular matter contradict what the draft reports says about that issue; or

► if you believe the inspectors’ actual inspection findings included certain positive findings which are not represented on the face of the draft report (this might be relevant to Section C of the Factual Accuracy Comments Form); or

► if you need further information in order to consider and respond to some of the findings in the draft report. For example, where a draft report raises criticisms regarding the adequacy of a particular patient’s care, it may be necessary to seek clarification of the patient concerned in order to consider whether the criticism made is valid.

► If providers do wish to request information from the inspection notes to assist with their Factual Accuracy Comments, there are some important points to bear in mind from CQC’s guidance on ‘Disclosure of Information to Providers’ (February 2017) and ‘Sharing Information’ (February 2017), including:

► “Confidential personal information (“CPI”) must be protected and not shared with the provider without strong lawful reasons”

► “CPI is personal information that was obtained or created by CQC in circumstances where confidentiality of that information would reasonably be expected”

► “CQC should…be transparent in its approach to our regulatory activities, which extends to the provision of “information” but not necessarily documents that the information is held in”

► “We must ensure that where a provider does make a request for information, we must as far as is reasonable try and comply with
If it is necessary to have access to information from the inspection notes in order to submit your Factual Accuracy Comments, it might be possible to get CQC to agree an extension of time for submission of the Factual Accuracy Comments Form until that information has been provided.

**Types of challenges which can be raised**

Examples of the different types of challenges which can be set out at the different sections of the Factual Accuracy Comments Form are as follows:

- **Section A:** this is merely for simple typographical or numerical errors which should be non-controversial.

- **Section B:** other challenges to the accuracy of the evidence in the draft report. A large number of different types of challenges can be raised here, including challenges:
  - to findings in the draft report which are factually inaccurate

- **Section C:** additional relevant information that should be taken into account (“completeness”): at this part of the form, providers should set out comments (together with any relevant supporting evidence) upon any matters which do not appear in the draft report but which
Drafting the challenges

When drafting Factual Accuracy challenges on the Factual Accuracy Comments Form the following points should be borne in mind:

► It is important to clearly identify, for each challenge, the passage of the report being challenged. This should be done in the left hand two columns of the form, setting out the page number and relevant heading under which the passage being challenged appears. It can also be helpful to quote the relevant passage being challenged in the main, third, column of the form before setting out the reasons for challenging that passage. (Because passages in the draft report are often repeated, particularly the Summary sections of the beginning of the report, it is important to reference all parts of the draft report where the relevant passage being challenged appears).

► It is important to set out the basis for your challenge clearly, and avoid shorthand, the meaning of which, whilst used widely within the particular provider’s services, may not be understood by the inspection team.

► If you have separate documentary evidence to corroborate the points you are making in your challenge, this should be attached. When attaching documents in support of any points, note the following:

► The evidence must relate to matters which were in place at the time of the inspection (as opposed to actions which have been taken since)

► If the supporting documentation is extensive, specify which part(s) of the document supports the point you are making

► If this document has already been disclosed to CQC as part of the inspection, make this clear.

► The provider may contend that, if changes to the factual findings are made as a result of the Factual Accuracy Challenges it has raised, there should be consequential changes to one or more of the ratings set out in the draft report. CQC’s Factual Accuracy Guidance confirms that, upon making any changes to the factual elements, CQC will automatically consider whether there should be any consequential impact on the judgements and ratings set out in the draft report. It is, however, worth expressly asking CQC to undertake this step.
What happens if a provider gets this wrong?

If the provider does not properly address any inaccuracies and misleading statements in the draft report by way of the Factual Accuracy process, the report will be published containing potentially inaccurate and misleading findings and potentially including inappropriate judgements with regard to compliance with the regulations and the ratings awarded.

Should the provider remain dissatisfied with the contents of the inspection report following the Factual Accuracy process, it may be helpful to take independent legal advice as, depending on what the provider wishes to achieve and what information the provider has submitted already, there are, potentially, a number of options:

- It may be possible to request CQC to carry out an independent review of the Factual Accuracy process
- It may be possible to request CQC to review the ratings (but not the factual findings) set out in the report – (although requesting such a review does not prevent CQC from publishing the report in the meantime)
- Judicial review challenge to CQC if it is considered that, in preparing the report, CQC has acted in a way which was: Unlawful, Irrational, Procedurally Flawed or contrary to some Legitimate Expectation
- It may be that the provider wishes to make a Complaint to CQC regarding its handling of the matter.

References

CQC Factual accuracy guidance
NHS and independent acute hospitals - Appendices to the provider handbook (March 2015)
AIHO is the trade association for independent healthcare hospitals across the UK. It provides a voice for the sector to stakeholders, media and government.

AIHO represents over 250 hospitals that provide services to insured, self-pay and NHS funded patients. AIHO members are a wide range of private and charitable providers. Members vary from large hospital groups to smaller, specialist providers of specific surgeries and treatments.

For more information about this key principle document, please contact AIHO at:

T: 020 3713 1740
E: info@aiho.org.uk